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UNITED STATES OF AMERICA

v.

DAVID M. HICKS

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) **Defense Response to Prosecution**  
) **Challenge for Cause Submission**

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) 9 September 2004  
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The Defense in the case of the *United States v. David M. Hicks* forwards to the Appointing Authority our response to the prosecution's filing of 8 September 2004, [Prosecution response to Defense Brief on Standard for Good Cause Challenge of Commission Members]

**Discussion:**

This response replies to the Prosecution's Response to Mr. Hicks' submission setting forth the proposed standard for cause challenges to Commission members. The Prosecution consents to Mr. Hicks's challenge to three members – Col. **NAME REDACTED**, Col. **NAME REDACTED**, and Lt. Col. **NAME REDACTED** – while opposing the challenge to Col. **NAME REDACTED**, and sidestepping any position with respect to the Presiding Officer (other than requesting that the Appointing Authority review that challenge pursuant to the Prosecution's proposed standard).

However, the Prosecution, in acceding to the challenge to Lt. Col. **NAME REDACTED**, which was based on his prior statements and his emotional response to the events of September 11, 2001, fails to make any distinction between Lt. Col. **NAME REDACTED** and Col. **NAME REDACTED**, who also revealed an intense emotional connection to those same events – a **REDACTED** under his command was killed; Col. **NAME REDACTED** attended that **REDACTED**'s funeral; and Col. **NAME REDACTED** visited the World Trade Center site two weeks after September 11, 2001, at a time when the damage and destruction wrought by the events of that day were still demonstrably vivid. *See* Transcript, August 25, 2004 (Hicks *Voir Dire*).

Indeed, the same factors that impair Lt. Col. **NAME REDACTED**'s ability to maintain impartiality as a judge and juror will have the same impact on Col. **NAME REDACTED**. Col. **NAME REDACTED**'s protestations to the contrary, even assuming they were made in good faith, are not a substitute for a judge and juror unaffected by important events related to the charges against Mr. Hicks. Even a good-faith attempt to separate the emotions generated by reference to September 11, 2001, cannot prepare a first-time, untrained judge, and a juror, for the series of choices and decisions that must be made dispassionately.

The Prosecution apparently recognizes that with respect to Lt. Col. **NAME REDACTED**. Yet Col. **NAME REDACTED** is in precisely the same position, and the Prosecution has not offered any rationale for treating him any differently.

Regarding Col. Brownback, the Presiding Officer, the standard enunciated by the Prosecution clearly disqualifies him. The potential appearance of bias – a standard which applies to all of the Commission members due to their status as judges for these proceedings – is manifest: Col. Brownback’s close personal and professional relationship with the Appointing Authority [*See* Transcript, August 25, 2004 (Hicks *Voir Dire*)], simply presents too great a danger that a reasonable observer would conclude that Col. Brownback was chosen as PO not for his independence and/or qualifications, but for exactly the opposite reason: his close connection to the Appointing Authority.

**Relief Requested:**

It is respectfully submitted that the challenge to Col. **NAME REDACTED** and Col. Brownback must be granted as well.

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